IN THE

# SUPREME COURT OF THE UNITED STATES

October Term 1975

## No. 75-823

RAYMOND BELCHER,
*Petitioner,*

v.

CASEY D. STENGEL, et al.,
*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF FOR THE PETITIONER

JOHN L. FRANCIS,
*City Attorney*
ROBERT A. BELL,
*First Assistant City Attorney*
PATRICK M. MCGRATH,
*Senior Assistant City Attorney*
90 West Broad Street
Columbus, Ohio 43215
*Attorneys for Petitioner.*

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term 1975

## No. 75-823

RAYMOND BELCHER,
*Petitioner,*

v.

CASEY D. STENGEL, et al.,
*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF FOR THE PETITIONER

### OPINION BELOW

The opinion of the Court of Appeals [reproduced in the Appendix to the Petition for a Writ of Certiorari at 22-35] is reported at 522 F.2d 438.

### JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Sixth Circuit was entered on September 16, 1975. The Petition for a Writ of Certiorari was filed December 10, 1975, and was granted April 5, 1976. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

## QUESTION PRESENTED

Does the fact that an off-duty police officer, out of uniform, is required by police department regulation to carry a weapon at all times, establish that any use of that weapon against the person of another, even though the officer is engaged in private conduct at the time, to be an act "under color of law" within the meaning of 42 U.S.C. §1983?

## STATUTORY PROVISION INVOLVED

The applicable statutory provision involved is 42 U.S.C. §1983:

> §1983 Civil action for deprivation of rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

## STATEMENT OF THE CASE

This case arose from an incident in a public bar in Columbus, Ohio, known as Jimmie's Cafe at approximately 1:30 a.m. on March 1, 1973. Respondents' decedents Michael Noe and Robert Ruff and Respondent Casey D. Stengel,[1] three men in their early twenties, became involved in an altercation with other

[1] The following are listed as Plaintiffs in the Complaint, Casey D. Stengel, individually and on behalf of all persons similarly situated; Charles Ruff, Administrator of the Estate of Robert D. Ruff, deceased; and Timothy Noe, Administrator of the Estate of Michael J. D. Noe, deceased. [A. 4]



patrons of the bar including the Petitioner, Raymond Belcher. At the time Raymond Belcher was an off-duty Columbus police officer, out of uniform, and engaged in private social activity. During the affray Raymond Belcher discharged a firearm, striking his assailants and resulting in the deaths of Noe and Ruff and seriously injuring Stengel.

On February 28, 1972, the Respondents brought this action in the United States District Court for the Southern District of Ohio, Eastern Division, under authority of 42 U.S.C. §1983 and §1985 alleging categorically that Raymond Belcher had acted in the performance of his duties and had violated Respondents' civil rights to due process and equal protection of the laws as provided in the Fourteenth Amendment of the Constitution of the United States. Jurisdiction was invoked under 28 U.S.C. §1331 and §1343 [A. 8] In addition to Raymond Belcher, Respondents also named as Defendants the City of Columbus, Ohio, and various police officers and supervisors who were alleged to have conspired to cover up facts of the incident.[2]

Aside from the mere conclusory allegation that Raymond Belcher had acted in the line of duty and the assertion that he had used a weapon which he carried while off-duty pursuant to a police department regulation, the only specific description of Belcher's

[2] The following persons were listed as Defendants in their capacity as Columbus police officers and individually: Chief Dwight Joseph; Captains Francis B. Smith, Robert Taylor, and Richard O. Born; Lieut. Earl Belcher; Sgt. P. Hopkins; Officers James Newell, E. R. Woods, E. Young and John Hawk; and various John Doe officers and administrative officials of the City of Columbus. At the time of trial James J. Hughes, Jr. was substituted as a John Doe Defendant for actions in his capacity as Safety Director of the City of Columbus. Mr. Hughes was dismissed pursuant to motion at the close of the Plaintiffs' case in chief. Mr. Hughes was the City Attorney of Columbus, Ohio, at the time of trial and participated as trial counsel on behalf of all other Defendants.

conduct set forth in the complaint is stated in paragraph 8 thereof as follows:

> "* * * Defendant Raymond L. Belcher, who was out of uniform and in no way identified as a Columbus policeman, and in no way involved in the minor dispute heretofore described, intervened by attacking one of plaintiff's decedent from the rear by grabbing him around the neck from the rear; said intervention by said Raymond L. Belcher being without any notification or attempt to notify anybody in the Cafe that he was an off-duty Columbus policeman and without any attempt by said Raymond L. Belcher to make a police arrest or a citizen's arrest of any kind * * *." [A. 10]

The District Court granted a Motion to Dismiss the City of Columbus. A Motion to Dismiss was filed on behalf of Raymond Belcher raising the jurisdictional defense that the Respondents had failed to properly allege that Belcher had acted under color of law and, in fact, had alleged facts which affirmatively stated that he had not acted under color of law. [A. 25-28] Further, motions to dismiss were filed on behalf of the Chief of Police, Dwight Joseph, the twelve John Doe Defendants, and the ten remaining Defendants all raising the issue of jurisdiction over the subject matter and failure to state a claim upon which relief may be granted. The District Court denied these motions. [A. 29-34] An Answer was filed on behalf of all Defendants on March 30, 1973, asserting, among other defenses, that Raymond Belcher was justified in using his weapon as a matter of self-defense and, again, that the District Court lacked jurisdiction as the Petitioner had not acted "under color of law" during the incident. [A. 35] The "under color of law" issue was also raised



in Defendants' Pre-Trial Statement of the Issues. [A. 37]

The case was tried to a jury with the trial commencing on June 10, 1974. At the close of the Plaintiffs' case in chief, the District Court granted a Motion for a Directed Verdict on behalf of all Defendants with the exception of Raymond Belcher. All Defendants except Belcher were dismissed at that point and, consequently, any claims with respect to 42 U.S.C. §1985. Although during oral argument in support of Raymond Belcher's Motion to Dismiss on the issue of self-defense, defense counsel made a statement which in effect agreed with the District Court's position that Belcher had acted under color of law, the District Court did not accept that as a stipulation of fact or law. [A. 199] The trial then proceeded against Belcher alone for a jury determination of the issues under 42 U.S.C. §1983.

The evidence was uncontradicted that on the morning in question Noe, Ruff and Stengel entered Jimmie's Cafe at approximately 1:00 a.m., ordered drinks, and that Noe and Stengel engaged in playing a "bowling game." [A. 41-43] Shortly thereafter the Petitioner, Raymond Belcher, entered the bar in the company of a Miss Bonnie Lohman and took a seat at a booth near the door. Raymond Belcher was an off-duty Columbus police officer; he was not in uniform and was engaged in private social activity. [A. 167-171] [Joint Ex. 25; R. 499; 529] He had in his possession a can of chemical mace which he carried of his own volition and, in addition, a pistol which he carried pursuant to a regulation of the Columbus police department which required off-duty officers to carry a weapon. [Joint Ex. 44(b); A. 75, 218, R. 529]

It was further undisputed that while Raymond Belcher was seated in the booth with Bonnie Lohman and two other acquaintances, an altercation erupted between Noe and another patron, Mrs. Agnes Morgan. Blows were struck between Noe and Mrs. Morgan resulting in Mrs. Morgan's being knocked either to the floor or against a piano. Mrs. Morgan's husband, Kyle Morgan, then arose and an altercation developed between Noe and Kyle Morgan; Noe being joined by Ruff. The fight escalated and Kyle Morgan ended up on the floor with Noe standing over him. [A. 171-173]

Although the evidence was in dispute as to whether Raymond Belcher became involved in the altercation as an aggressor or as a matter of self-defense, there was absolutely no dispute, and it was set forth in the Complaint, *infra*, that at no time did he identify himself as a police officer or make any attempt to personally effect an arrest, either as a police officer or as a private citizen. [A. 174]

Belcher testified that he observed the fight and knew it should be stopped. He decided to call the police which necessitated leaving the bar and proceeding to a telephone booth on the sidewalk just outside. He felt the Respondents would not permit a telephone call to be made from within the bar. As he arose from his seat he told Bonnie Lohman that he was going to call the police and for her to leave the premises should more trouble occur. Immediately he was attacked from behind by Respondent Stengel, who had positioned himself near the door. [A. 172-174] When Belcher arose he had placed his tear gas cannister in his hand and it went off prematurely through a malfunction, emitting a cloud of gas rather than a liquid stream. [A. 177-178] The gas did not spray anyone in particular but generally went over everyone. Once the gas was emitting Belcher did indicate an intent to spray Respondent Noe who was now coming toward him. [A. 186, 126] Belcher could not remember whether the tear gas actually went off immediately before or after he was attacked by Stengel. [A. 195] Belcher then described the ensuing struggle through to the point where he was compelled to use his weapon as a matter of self-defense:



> "Mr. Stengel began throwing punches, attempting to strike me with his fist, and attempted to throw me to the floor. I grabbed ahold of the booth and again told him to let go of me.
>
> "Mr. Ruff ran across the floor at that point and I was fighting both men. I was tripped or thrown on top of a small table there by the front of the bar itself, I think they are known as cabaret or cafe tables, they are very small tables, maybe two feet square.
>
> "My back went over this table. My head struck the juke box, and I recall being kicked for a moment after that. I was kicked several times and then there was a moment of darkness where I could neither feel nor hear anything. I don't know whether I was unconscious or apparently I was, but how long I was unconscious I have no idea. It could have been ten seconds; it could have been ten minutes.
>
> "As I looked up from the floor with my legs up over a table, I could see nothing but feet and fists. I was being kicked in the face and the head by at least two men.
>
> "At that time I tried to get up off the floor. I literally tried to pull myself up off the floor by using the men's clothing that were on top of me. I at one point had a man's belt in my hand and tried to drag myself up off the floor by his belt buckle,

so I could get up off the floor and defend myself. "I was kicked first one direction, then the other direction. I continued to try to get up off the floor. I was getting tired. I was beginning to lose.

"At that time somewhere in this struggle my tear gas was kicked out of my hand. I had been spraying it, trying to spray directly into these men's faces from the floor but somewhere during the fight the tear gas was stomped from my hand.

"As I began to realize that I wasn't gonna be able to get myself off the floor, I reached for the pistol that I carried in my waistband in my pants. At that time I was carrying a .32 Browning automatic, and the gun was not there.

"I was still being kicked and stomped. I put my arms, my left arm over my face to shield my face from these kicks, and looked across the shiny barroom floor to see if the pistol was lying there some place.

"The gun was not there. The thought went through my mind, oh, God, if these men, whoever they are, find that gun on the floor, they will kill me with my own weapon.

"I felt the pistol underneath my back, still being kicked and stomped. I brought the weapon around in my right hand and shoved backwards to get these men off of me and I fired three shots straight into the ceiling, or straight into the mass of bodies that were on top of me.

" * * *.

Question: "Officer Belcher, as you were laying on the floor after you had come to after you had recovered your weapon, as you removed the weapon from behind your back and pointed it upward . . . what thought was in your mind?"

" * * *."

Answer: "The thought in my mind at that point was that I was going to be killed on that barroom



floor if I did not use the weapon I had, I would be killed." [A. 174-176, 182]

Belcher's testimony of his involvement in the matter was corroborated by all other eye-witnesses with the exception of Stengel. Although Belcher testified to firing three shots inside the bar, he did indicate the weapon discharged during a struggle with Noe outside the bar when Belcher had struck Noe in the face with the pistol still in his hand. [A. 176] Noe was found outside the bar. [R. 294] Belcher stated that Noe was shot inside the bar [A. 189] and the location of his gunshot wound was in the chest. [Joint Ex. 48; 458, 529; A. 249]

Stengel's testimony in regard to Raymond Belcher's involvement did not include evidence bearing on the question of whether or not Belcher acted as a private citizen or pursuant to a police duty. His testimony does not indicate that Belcher had identified himself as a police officer; nor did he know Belcher or understand him to be a police officer. He merely portrayed Belcher as an aggressor.

Stengel testified that Belcher grabbed Robert Ruff from behind and that he (Stengel) in turn grabbed Belcher and threw him to the floor. [A. 46] He also stated that he did not kick Belcher but only kicked at Belcher's hand which grasped the chemical mace. [A. 46, 62] Stengel did state that his head was turned and he could not see Ruff or Belcher immediately prior to the shots' being fired. [A. 47] Stengel's description as to Belcher's involvement was in direct conflict with all other eye-witnesses.

The only other evidence in regard to Belcher's actions came in the form of later developed opinions by certain City officials and police supervisors who

were not eye-witnesses to the incident, but formed the view that Belcher had acted in the line of duty. These opinions were admitted into evidence during Plaintiffs' case in chief wherein the defendant supervisors and officials were questioned in order to establish a conspiracy out of their administrative actions. These Defendants were dismissed at the close of Respondents' evidence. Their testimony established that Belcher had applied for and received workmen's compensation benefits for the injuries he had incurred that evening. [A. 76-79] The Chief of Police of the Columbus Police Department testified that a police officer was required to take action in any type of police or criminal activity twenty-four hours a day and would be disciplined if he did not do so. He was of the opinion that Belcher had acted under the authority of that requirement. [A. 76-77] He also indicated his opinion of the matter was based on the report and statements of the eye-witnesses as gathered by the Firearms Board of Inquiry which included Raymond Belcher's statement. [A. 70, 72] [Joint Ex. 25; R. 420, 529] Also, a letter to Belcher from the Safety Director of the City of Columbus, James J. Hughes, Jr., a Defendant and counsel in the case, was read into evidence which stated that it was the opinion of those police supervisors who comprised the Firearms Board of Inquiry that Belcher was justified in using the firearm. Hughes further stated in the letter his opinion that Belcher acted in the line of duty. [A. 107, 110-111]

At the close of all evidence the issues were submitted to the jury including the question of whether or not Belcher had acted under color of law in the incident. A portion of the District Court's charge to the jury included the following:



> "The manner in which Defendant Belcher may have acted under color of state law was that he carried a gun, a side arm, while off duty. The reason he carried a weapon is because of a police regulation issued by the Chief of Police of the Columbus Police Department which reads in part as follows:
>
> 'Members of the Division of Police while off duty shall carry the weapon and ammunition issued to them:
>
> One: Carrying a personal weapon off duty. Members of the Division of Police desiring to carry a personal hand gun instead of their issued revolver, shall request permission through the Police Range Officer.' " [A. 210]

The jury found that Belcher had acted under color of law as implied in its verdict which awarded Stengel $800,000 in compensatory and $1,000 in punitive damages; Noe's estate $9,000 compensatory and $1,000 punitive damages; and Ruff's estate $19,000 compensatory and $1,000 punitive damages. On June 19, 1974, the District Court entered its judgment reflecting the verdict. [A. 254] On June 28, 1974, Belcher filed a Motion For Judgment Notwithstanding The Verdict again asserting that the evidence did not support the finding that he had acted under color of law. [A. 256] The District Court overruled the motion on September 11, 1974. [A. 259] An appeal was taken to the Sixth Circuit specifically raising the issue as to whether the District Court erred in refusing to direct that Petitioner had not acted under color of law. The case was docketed in the Sixth Circuit as case number 75-1075. On September 16, 1975, the Sixth Circuit rendered its judgment and issued a written opinion

affirming the District Court. [Appendix to Petition for a Writ of Certiorari, page 21]

The question posed herein was consistently raised by pleading and motions of Petitioner in the District Court and on appeal. The question was specifically considered and decided by the Sixth Circuit. [Appendix to Petition for a Writ of Certiorari, pages 22-35]

## ARGUMENT

### I. The Findings by the Sixth Circuit and the District Court that the Petitioner had acted under color of law established a construction of 42 U.S.C. §1983 which conflicts in principle with the applicable decisions of this Court and Lower Federal Courts. The Decisions below broaden the application of that statute and create implications for its unwarranted extension.

It is Petitioner's contention that the District Court lacked jurisdiction under 42 U.S.C. §1983 in that the Complaint did not properly allege, nor was the evidence sufficient to support a conclusion, that the Petitioner acted under color of law. By overruling Petitioner's Motion to Dismiss, submitting the issue to the jury, and failing to grant Petitioner's Motion for a Judgment Notwithstanding the Verdict, the District Court, as affirmed by the Sixth Circuit, has decided that issue against the existing principles set forth by applicable decisions of this Court and other lower Federal Courts. The evidence did not support the jury's determination, implicit in its verdict, that the Petitioner had acted under color of law. The determinations below, at the very least, broaden the "under color of law" requirement of 42 U.S.C. §1983 and create implications for its unwarranted extension.



42 U.S.C. §1983, originally known as the Ku Klux Act of April 20, 1871, was enacted after the Civil War to establish a federal cause of action to redress deprivations of federal constitutional rights which occurred as a result of state action. From the Act's inception the Supreme Court of the United States has recognized its application provides redress only for actions involving state authority and does not erect a shield against private conduct between individuals, no matter how serious or wrongful such conduct may be. This Court stated in *The Civil Rights Cases*, 109 U.S. 3, 9-12 (1883):

> "In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party it is true, whether they affect his person, his property or his reputation; but if not sanctioned in some way by the State, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress."

Although this Court has applied the concept of "under color of law" to official actions which constituted a "misuse of authority," *United States v. Classic*, 313 U.S. 299, 326 (1941) and also to officials who engaged in violence under a "pretense" of law, *Screws v. United States*, 325 U.S. 91, 111 (1945) the Court has never abandoned and has continually emphasized the essential dichotomy between conduct which is wholly private and not within the scope of 42 U.S.C. §1983, and

that which is done in pursuit of one's official duties. In *Screws, supra*, Justice Douglas pointed out the distinction at 325 U.S., pages 108 and 111:

> "We agree that when this statute is applied to the action of the state officials, it should be construed so as to respect the proper balance between the States and the federal government in law enforcement. Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States.
> "* * *.
> "* * *.
> "* * *. Here the state officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective. They acted without authority only in the sense that they used excessive force in making the arrest effective. It is clear that under 'color' of law means under 'pretense' of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. * * *."

The principles applied in determining the question of whether "state action" is present in terms of the Fourteenth Amendment to the Constitution of the United States are easily analogous to those involved in reviewing whether action "under color of" state law exists. The terms "state action" and "under color of" state law are usually treated as one and the same although it has been recognized that when a private party acts alone, more must be shown to establish that he acts "under color of" a state statute or other authority than is needed to show his actions constitute "state action." *Adickes v. Kress & Co.*, 398 U.S. 144,



210 (1970) [Brennan, J., concurring in part]. Although this Court has not established a clear definition of what is and what is not action under color of law, it has clearly provided that more than a trivial nexus between the entity on the one hand, and the state on the other, is necessary. In *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972) this Court stated:

> "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in *The Civil Rights Cases, supra*, and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' *Reitman v. Mulkey*, 387 U.S. 369, 380, 18 L.Ed.2d 830, 838, 87 S. Ct. 1627 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition."

Moreover, the existence of heavy and extensive regulation by the State does not necessarily convert an entity's otherwise private actions into those of the State for purposes of the Fourteenth Amendment.[3] There

[3] Officers of the Division of Police of the City of Columbus are subject to a regulation requiring them to carry a handgun; either, that regularly issued to them by the department, or a personal handgun not to exceed .38 caliber. [A. 217] The regulation does not specify precisely when or under what circumstances the weapon may or may not be used. Furthermore, the regulation does not require the officer to carry the weapon off-duty when the situation would be impractical and leaves the determination of impracticality to the good judgment of each officer. [A. 219]

must be a sufficiently close nexus between the State and the activity complained of in order to consider the activity to be that of the State. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350, 351 (1974).

Furthermore, where the allegation of state action or involvement is not obvious, the question as to its existence emits no easy answer and requires a careful sifting of the facts and circumstances of each particular case. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

In major cases involving the construction to be given the term "under color of" law or state authority, this Court has made its determinations by focusing not upon whether the defendant possessed or used a physical instrument peculiar to his office, but on whether or not he was engaged in, or under the pretense of engaging in, his official duties. *United States v. Classic, supra* [state election officials engaged in election fraud]; *Screws v. United States, supra* [state police officials using unlawful force during an arrest]; *Williams v. United States*, 341 U.S. 97 (1951) [police special deputy coercing confessions during a criminal investigation]; *Griffin v. Maryland*, 378 U.S. 130 (1964) [special deputy sheriff wrongfully arresting and instituting criminal proceedings]. In *Griffin, supra*, this Court stated the basis for its determination that the actor had committed violations of constitutional significance was that he had purported to exercise his authority as deputy sheriff, notwithstanding his combined status as an employee of a private corporation. In 378 U.S., at page 135, the Court pointed out:

> "* * *. If an individual is possessed of state authority and purports to act under that authority his action is state action. * * *."



In applying these principles, lower Federal Courts have recognized that a person does not act "under color of law" simply because he is employed by the state. *Cole v. Smith*, 344 F. 2d 721 (8th Cir. 1965); *Byrne v. Kysar*, 347 F. 2d 734 (7th Cir. 1965); *Duzymski v. Nosal*, 324 F. 2d 924 (7th Cir. 1963). Nor does he so act purely by reason of his status as a police officer engaged in an assault as a matter of private conduct. *Nugent v. Sheppard*, 318 F. Supp. 314 (N.D. Ind. 1970); *Johnson v. Hackett*, 284 F. Supp. 933 (E.D. Pa. 1968); *Watkins v. Oakland Jockey Club*, 183 F.2d 440 (8th Cir. 1950). Rather, the proper focus must be upon the nature of the act performed and whether the officer had actually embarked upon the performance of his official duties. *Robinson v. Davis*, 447 F.2d 753 (4th Cir. 1971), *cert. denied*, 405 U.S. 979 (1972); *United States, ex rel., Smith v. Heil*, 308 F. Supp. 1063 (E.D. Pa. 1970); *Johnson v. Hackett, supra.*

Contrary to the principles set forth above, the Sixth Circuit and the District Court below, wrongly relied upon the fact that the Petitioner resorted to the use of a weapon which he carried pursuant to police regulations, to raise the inference that the weapon was used under color of law. [Petition for Writ of Certiorari, p. 25.] Also, the District Court included such inference in its charge to the jury. [A. 210] To permit the use of such a weapon to alone raise the inference of official action would truly eliminate any possibility of its use in private conduct and would irretrievably extend the scope of 42 U.S.C. §1983 beyond its intended application. In *Screws v. United States, supra*, this Court did not infer the defendants' conduct to be under color of law because they were police officers who used

a blackjack, but rather because they used the blackjack in the performance of their official duties. In its opinion this Court stated in 325 U.S. at pages 108 and 109:

> "* * * . We are of the view that petitioners acted under 'color' of law in making the arrest of Robert Hall and in assaulting him. They were officers of the law who made the arrest. By their own admissions they assaulted Hall in order to protect themselves and to keep their prisoner from escaping. It was their duty under Georgia law to make the arrest effective. Hence, their conduct comes within the statute. * * * ."

Unlike the situation in *Screws, supra*, the Complaint in the instant case specifically alleges that the Petitioner was off-duty, out of uniform, did not personally attempt to arrest anyone either as a police officer or as a private citizen, and at no time did he notify or attempt to notify anyone that he was an off-duty police officer. [A. 10-11] The Complaint merely alleges aggressive involvement in an altercation.

The Petitioner did not contend in his Motion to Dismiss [A. 24-28], as suggested by the District Court in its Order overruling the motion [A. 31], that he was not under color of law because of his off-duty status, but rather that the proper inference to be derived from the facts pleaded was that the Petitioner did not act as a police officer or under the "pretense" of law.

A careful examination of the evidence at trial from those who witnessed the incident (including the Petitioner and the Respondent, Stengel) produced nothing which would indicate that the Petitioner had, at anytime, embarked upon the exercise of his official duties. As was alleged in the Complaint, the witnesses did not



dispute that the Petitioner was off-duty and engaged in private social activity. It was further undisputed that he did not attempt to personally make an arrest or identify himself as a police officer; nor did the Respondents' decedents or the Respondent understand him to be a police officer. The contrast in facts between Respondent Stengel's testimony from that of the other witnesses is that Stengel merely portrays the Petitioner as an aggressor. Involvement in an altercation, even where the person is a police officer and an aggressor, does not alone raise the inference of action under color of law. *Screws v. United States*, 325 U.S. 91, 108, 109 (1945); *Johnson v. Hackett*, 284 F. Supp. 933 (E.D. Pa. 1968); *Smith v. Heil*, 308 F. Supp. 1063 (E.D. Pa. 1970). Furthermore, the Petitioner's stated intention was to proceed to a telephone in order to call the police which is no more than the expected act of any private citizen under the circumstances.

In its Opinion [Petition for Writ of Certiorari, page 26], the Sixth Circuit commented that the Petitioner used poor judgment in failing to identify himself as a police officer which that Court believed would have easily solved matters. The Petitioner suggests that the more logical inference to be drawn from such a failure is the fact that the Petitioner did indeed not intend to act as a police officer, but rather as a private citizen. In any event, where there is an absence of evidence to indicate that the Petitioner had engaged in, or attempted to engage in, the performance of his official duties, to find his involvement in an altercation to be activity under color of law is contrary to the stated principles governing 42 U.S.C. §1983.

In addition to its focus upon the weapon used, it is clear from the Opinion of the Sixth Circuit that it placed considerable reliance upon the opinions of cer-

tain City officials who had not witnessed the incident but offered their later developed beliefs that the Petitioner had acted in the line of duty and was covered by the Workmen's Compensation Law of the State of Ohio. [Petition for Writ of Certiorari, page 25] It is Petitioner's contention that the lower Courts wrongly relied upon such evidence which was offered during the Plaintiffs' case in chief, where Defendant supervisors were questioned in order to establish Respondents' claims of conspiracy in regard to the Defendants' administrative actions. Moreover, any opinions so offered were based upon the statements as given by the eye-witnesses to the incident and thus, upon the same facts as recited above in regard to the nature of the Petitioner's involvement. The question of whether the Petitioner acted under color of law is a question of law for the determination of the Federal Court based upon a careful examination of the manner and character of his actions at the time and place of the event. *Robinson v. Davis*, 447 F.2d 753 (4th Cir. 1971), *cert. denied*, 405 U.S. 979 (1972). Opinions offered by persons who did not witness Petitioner's actions are not relevant to the determination of the federal issue in question and should not be permitted to displace a Federal Court's judgment as to that jurisdictional issue. To allow such displacement would stray from the judicial requirement of a "careful sifting of the facts and circumstances of each particular case." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

Although the Petitioner contends that the decisions of the District Court and the Sixth Circuit below conflict with the past interpretations given by this Court in its considerations of the phrase "under color of



law," a clear definition of those words has yet to be established. In *Monroe v. Pape*, 365 U.S. 167 (1961); *Screws v. United States*, 325 U.S. 91 (1945); and *United States v. Classic*, 313 U.S. 299 (1941), this Court was not confronted with allegations of such a tenuous attachment to official action as suggested here by the mere existence and use of a weapon authorized by the actor's office. Rather, those cases involved situations where the defendants had clearly embarked upon the pursuit of their official duties and, while performing those duties, committed wrongful and unauthorized acts.

Although as recognized in *Monroe v. Pape*, *supra*, the words "under color of" law or state authority may not lend themselves to precision in the law, the danger of a continuing uncertainty in the application of that phrase is evidenced by the opinions of the District Court and Sixth Circuit in the instant case which broaden the scope of 42 U.S.C. §1983 and create implications for its unwarranted extension. To focus merely upon the official nature of the weapon used to alone raise the inference that it was used "under color of law" or other authority would easily extend the statute's application to encompass any accidental discharge of the weapon by an off-duty officer or even its use in purely criminal conduct which sets in total opposition to the user's authority or duty. Such an interpretation would virtually emasculate the well recognized exclusion of private conduct set forth in *The Civil Rights Cases*, 109 U.S. 3 (1883) from within the ambit of the Act.

The same concerns are apparent in view of the lower Court's treatment of the nature of this Petitioner's actions. Whether one accepts the version that Belcher

was involved in the incident as an aggressor or as a matter of self-defense, the essential ingredient of official action does not surface. Even accepting Belcher as an aggressor, it is difficult to find a meaningful distinction between his involvement and that of the witness, Kyle Morgan. [A. 142] Both were engaged in private social activity and both involved themselves in the altercation. The actual difference upon which the District Court and the Sixth Circuit seem to have relied in order to hold Belcher subject to a federal cause of action is that, when working, Belcher was employed as a police officer. Even where a Columbus police officer is subject to a requirement that he take action twenty-four hours a day when confronted with a criminal situation, that does not lead to the conclusion, nor is it mandated by the requirement, that every act taken which could be said to comply therewith, would consist of an action "under color of law." The requirement could be met by purely private action. Under the impact of the lower Courts' rulings, acts of a private nature, not necessarily peculiar to the duties of a police officer, are swept into the realm of constitutional significance because the actor is employed as a police officer. Calling police for assistance or reacting to a situation in self-defense, would be construed automatically as acts under color of law. Such interpretations could not meaningfully be distinguished from a police officer's disciplining his own children's wrongful acts at home, or negligently injuring a person while driving a police cruiser home from work under departmental regulations. Such a view would seem to hold that once a person is sworn in as a police officer, his existence as a private citizen is terminated.



The affect of such an application of 42 U.S.C. §1983 as has occurred in this case is to blur the concept of "private" as opposed to "public" action, or "pretense" of public action, to an irretrievable point. As expressed in *The Civil Rights Cases*, 109 U.S. 3 (1883), the Act was not intended to become the foundation of a general federal tort remedy to accompany State law. This is particularly significant in view of the extensive proliferation of cases brought to the Federal Courts for determination under 42 U.S.C. §1983 and related sections, and the consequent burden thus placed upon the Federal judiciary.

Such considerations are no less important to the administration of local law enforcement. The regulations dictating that officers carry weapons while off-duty have valid and essential purposes. They provide a means whereby the officer may take police action twenty-four hours a day and a capability of instant response where emergencies require supervisors to call the off-duty personnel to an on-duty status. Also, they assure individual officers a manner of self-defense against individuals who may wish them harm by reason of the special nature of their employment. Proper law enforcement by honest and conscientious law officers is vital to the cities of this nation which are experiencing a continual rise in crime. Certainly the impact of the lower Courts' rulings here will tend to stultify proper law enforcement and lessen a measure of protection for citizens as well as for the individual officer. This Court has recognized as a matter of public policy that federal courts should not act so as to dampen vigorous law enforcement or create a hesitancy upon the individual officer to take action. Such a policy should also apply to allow officers the freedom of self-defense in the carrying on of their private lives.

Had the Sixth Circuit and the District Court below reviewed the properly relevant evidence and allegations pertaining to the federal question presented under 42 U.S.C. §1983, using the stated principles set forth by this Court and lower Federal Courts, they would have been compelled to determine that the Petitioner had not acted under color of law.

## CONCLUSION

It is respectfully submitted that for the foregoing reasons the judgment of the District Court, as affirmed by the Sixth Circuit, should be reversed.

Respectfully submitted,

PATRICK M. MCGRATH,
*Trial Attorney*
*Senior Assistant City Attorney*

City Hall, 90 West Broad Street
Columbus, Ohio 43215
Telephone: (614) 461-7460

*Attorney for Petitioner*